

**FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE**

In the Matter of the Appeal of

Hearing Examiner File:
W-08-005

**FREMONT NEIGHBORHOOD
COUNCIL, et al**

from a Determination of Non-significance issued
by the Director of Seattle Public Utilities

Introduction

Pursuant to the State Environmental Policy Act, Chapter 43.21C RCW, (SEPA), as adopted in Chapter 25.05 Seattle Municipal Code (SMC), the Director of Seattle Public Utilities (Director or Department) issued a Determination of Nonsignificance (DNS) for reconstruction of a transfer station. The Fremont Neighborhood Council, Wallingford Community Council, Erika and John Bigelow, Mary Sussex, and Norm and Beverly Davis (Appellants) appealed the DNS.

The appeal hearing was held before the Hearing Examiner (Examiner) on October 1, 2, and 7, 2008. Parties represented at the hearing were the Appellants, by Toby Thaler, attorney-at-law; and the Director, by Robert D. Tobin, Assistant City Attorney. The record was held open for purposes of the Examiner's site visit, which occurred on October 8, 2008.

After considering the evidence in the record and inspecting the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal:

Findings of Fact

Site and Vicinity

1. The proposal site is the North Recycling and Disposal Station (NRDS), which is located in the Wallingford neighborhood near Lake Union, at 1350 North 34th Street, and an adjacent parcel located at 1550 North 34th Street. It is bounded on the north by North 35th Street, on the south by North 34th Street, on the west by adjacent parcels, and on the east by Woodlawn Avenue North, and includes Carr Place North. In addition, two single-family-zoned parcels at the northwest corner of North 35th Street and Woodlawn Avenue North are used for NRDS employee parking.
2. The existing NRDS site is zoned industrial (IC-45 and IB U/30), as is the surrounding area to the west, south, and southeast, which is consistent with the Comprehensive Plan designation for the area. These industrial zones include commercial, industrial and light industrial uses. In the IC-45 zone, solid waste transfer is an administrative conditional

use, and recycling is a permitted use. In the IB U/30 zone, solid waste transfer is prohibited, but evidence in the record indicates that the facility operates in this zone as a nonconforming use.

3. North of the site is commercial and single-family zoning (C2-30 & SF 5000). To the east, across Carr Place North, is commercial zoning (C2-40) and then single-family zoning (SF 5000). Development in the commercial zones is generally consistent with zoning. The single-family zone includes both multi-family and single-family residential development.

4. The adjacent parcel included in the project site is zoned commercial and developed with the Oroweat Distribution Warehouse. It is now owned by the Department, and has been nominated for landmark status to determine whether it meets the criteria for landmark designation. (Exhibit 45) Recycling and office uses are permitted under existing zoning.

Background

5. In August of 1998, the Department developed a Solid Waste Management Plan (SWMP) that included a discussion of the potential for developing a recycling center at the NRDS and stated that the City would explore the possibility of acquiring nearby property to do so. SWMP at 6.15 and 7.15-7.16.

6. A "Plan for Seattle's Recycling and Disposal Stations" (RDS Plan), also issued in August of 1998, included more detailed information on the future of the City's two recycling and disposal stations, including a statement that acquisition of additional property would be required to expand recycling opportunities, realign on-site traffic, reduce off-site queues and add more trailer parking at the NRDS, and a discussion of specific potential parcels of interest. RDS Plan at iv, 9, 16-17, and 26.

7. The Final Programmatic Environmental Impact Statement (FEIS) prepared for the 1998 SWMP again noted that the City would investigate purchasing property adjacent to the NRDS for a self-haul recycling center, FEIS at 2-44, 2-46, 2-51, and 2-75, and concluded that in addition to construction impacts, certain off-site impacts at the transfer stations would continue, including "noise from traffic, heavy equipment, and depositing recyclables in containers; odor impacts from garbage and yard waste transfer; localized increases in various vehicle air emissions; and localized access problems such as off-site queues. As the City's population grows, impacts associated with operating the two stations would continue to increase." FEIS at S-9.

8. The FEIS states that the City is using phased environmental review:

Adoption of the 1998 Solid Waste Management Plan is a non-project or programmatic action. When final, the programmatic EIS on the 1998 [SWMP] will be part of a phased environmental review under the City of Seattle's SEPA ordinance. ... Should the program directions recommended

in the Final Draft Plan lead to the development of *new* facilities, *siting and construction* of those facilities could also be subject to project-specific environmental review. Modifications to *existing* facilities could also be subject to project-specific environmental review depending on the nature of the modifications. The need for additional project-specific environmental review will be determined on a case-by-case basis.

FEIS at 1-31 (emphasis added).

9. In response to Council Resolution 30431, the Department prepared a Solid Waste Facilities Master Plan (SWFMP) in 2003 that recommended siting a new intermodal facility and improving the North and South RDSs. (Exhibit 32) The recommended option for the NRDS was summarized as rebuilding a larger tip building and adding property for offices and recycling. SWFMP at ix. The document discusses improvement options for the NRDS, and includes an analysis of the recommended option. SWFMP at 48-50. It also includes a technical document on detailed facility design criteria for the NRDS (Appendix G), and a technical document discussing potential sites for relocating the NRDS. (Appendix L) The Appendix concluded that after reviewing "zoning, road access, parcel size, availability, cost, and proximity to other uses, it was decided that no other sites were significantly better than the existing site" to warrant moving the facility, and that the public would be better served by upgrading existing facilities to minimize impacts on neighbors. It noted that this solution was consistent with most public comments received. SWFMP, App. L at 1-2.

10. The Department issued a determination of significance and scoping notice for an EIS on the SWFMP in August of 2004 (Exhibit 18). However, in August of 2005, an FSEIS was issued for just the intermodal transfer facility. (Exhibit 34) The FSEIS stated that preparation of SEPA documentation for the NRDS and SRDS should be postponed to a later date because those improvements were not scheduled to occur for several years. The document further explained the scoping decision as follows: 1) programmatic decisions on improving the NRDS to address deficiencies and inefficiencies were made in the 1998 SWMP and SEPA documents reviewing it, and the logical next step would be project specific environmental review; 2) SEPA documentation for the NRDS should be prepared closer in time to building permit application, when more meaningful evaluation could occur; 3) delaying the SEPA review for the NRDS would be consistent with phased review, allowing the public to focus on issues ready for decision and excluded those that had already been decided or were not yet ready for consideration; and 4) improvements to the NRDS and to the proposed solid waste intermodal transfer facility were not related closely enough to be a single course of action under the SEPA Rules, because each would proceed whether or not the other was constructed, they were geographically separate from one another, permitting and construction of the projects would be staggered, and the nature of the decisions on each was different, with one being a programmatic, site selection decision, whereas the location and general nature of the improvements at NRDS had been addressed in the 1998 comprehensive plan process. Exhibit 34 at 2-25 to 2-27.

11. Ultimately, the City determined not to pursue the intermodal facility, the Council and Mayor reached agreement on a configuration that rebuilds the NRDS and SRDS and a strategy to reduce the overall waste stream, and the Department was directed to pursue rebuilding the NRDS (Exhibits 42 and 35). Ordinance 122447 (Exhibit 42) amended the adopted Capital Improvement Program to state that the Department would "strive for the North Transfer Station to be rebuilt with new buildings that are the same height as the existing building and have a footprint that is contained between Ashworth Avenue North and Interlake Avenue North."

Proposal

12. The proposal is to replace the existing NRDS facility with new and additional facilities on the existing parcel and the adjacent parcel to the east. Existing structures are to be demolished, and construction is to include the new transfer station building, scales, access roads, operations yard, landscaping and associated facilities on the property.

13. The new transfer building is to be fully enclosed except for vehicle entrances on the sides. Building height and development setbacks are to be within the zone limits. Carr Place North is proposed to be vacated and incorporated into the site, and recycling facilities and offices would be located on the adjacent Oroweat parcel.

14. Primary vehicular access to the NRDS would remain at North 34th Street, with a secondary access for transfer trailers from North 35th Street. The record shows that both left and right turns into the facility from North 34th Street would be maintained. The adjacent single-family-zoned parcels to the north across 35th Street would continue to be used for employee parking.

15. The proposal calls for a queuing analysis in conjunction with project design, with the design standards specifying that vehicle queues from the NRDS site would not block traffic on adjacent roadways 95 percent of the time on the average day of the projected peak traffic month in 2030. Proposed construction would be required to adhere to applicable regulations and construction practices to reduce air and odor emissions and noise.

Director's DNS

16. The Department reviewed the proposal pursuant to SEPA for potential impacts on air quality, noise, water quality, transportation, public views, and neighborhood aesthetics. The review included the SEPA checklist (Exhibit 4) and several technical reports, as well as consideration of the mitigation measures incorporated into the proposal. (Exhibit 17) The mitigation measures include such things as building a solid-walled structure, building within all Land Use Code requirements, including aesthetic architectural features to reduce visual prominence, and reducing back-up and vehicle idling times.

17. A Transportation Technical Report (Exhibit 24) was prepared for the proposal based traffic scenarios developed to represent a range of possible waste stream flows at the

NRDS. (Exhibit 24, Appendix A) The Transportation Report determined that the proposal would increase daily trips to the site by 14 to 40 trips in 2030, primarily due to employee trips. The Report also concluded that because new facilities would add flow improvements for the same number of customers that would be expected in the no action alternative, no adverse impacts were likely for vehicle queuing. Further, the Report found that no adverse impacts were likely for traffic safety, parking, or at any off-site intersections.

18. An Air Quality Technical Report was prepared for the project (Exhibit 26). The Air Quality Report reviewed existing air quality and assessed the impacts of the proposal on air quality, including construction impacts, operational impacts, indirect impacts and cumulative impacts. The Report states that because the project would add almost no additional vehicle trips or additional heavy equipment to the current configuration, there would be virtually no effect on air quality.

19. A Visual Technical Report was also prepared for the project to evaluate potential changes in visual quality that would occur as a result of the proposal. (Exhibit 1, Attachment 2) The Visual Report selected eight viewpoints to the north of the site that were most sensitive to view impacts from the proposal. The Report then analyzed what those impacts would be in light of the general design parameters given for the project, including such factors as the maximum structure height allowed by existing zoning, the general operational requirements of transfer station buildings, the fact that certain of the facilities were likely to be located on a particular part of the property, etc.

20. The Visual Report concluded that the proposal would impact views, in that private and public views of downtown, Queen Anne Hill and mature trees would be reduced from some viewpoints if the building footprint is expanded east or west, or if the height of the building is increased within the zoning limit. None of the views protected under the City's SEPA policies would be affected.

21. The SEPA Checklist and DNS state that the Noise Technical Report concluded that most noises from the proposal would be generated by traffic using the stations and machinery processing the materials dropped off there, as in the present day, but that a new noise source would be added from exhaust fans used for dust and odor control in the building. The building is to be designed to reduce existing maximum noise levels immediately outside its walls by approximately 10 dBA, reducing perceived noise by half.

22. The Department's SEPA responsible official determined that construction and operational practices and design standards that the Department would implement would result in the proposal having no significant adverse environmental impacts, and issued a DNS. (Exhibit 17) The SEPA checklist, technical reports and DNS were then reviewed by a private consultant, who determined that the checklist met SEPA requirements and concurred with the DNS. (Exhibit 46)

Appeal

23. The Appellants assert that: 1) The Department "shifted the scope of the proposal" to avoid preparation of an EIS and in doing so, violated SEPA's phasing requirements and prohibition on segmentation or "piecemealing;" 2) the proposal lacks sufficient detail to allow for a proper assessment of environmental impacts; 3) even if the siting decision for the project was proper, the proposal will have significant adverse environmental impacts because it was improperly defined by using existing conditions as the baseline for evaluation; and 4) regardless of how the proposal is defined, it will have significant adverse impacts that have not been adequately mitigated under SEPA.

Applicable Law

24. SEPA provides that a threshold determination [and EIS if required] shall be prepared "at the earliest possible point in the planning and decision making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." SMC 25.05.055 B.

25. Proposals are to be properly defined. SMC 25.05.060C.1. "Proposals include public projects or proposals by agencies" SMC 25.05.060C.1.a. "A proposal by a lead agency or applicant may be put forward as an objective, as several alternative means of accomplishing a goal, *or as a particular or preferred course of action.*" SMC 25.05.060C.1.b (emphasis added). "Agencies *are encouraged* to describe public or nonproject proposals in terms of objectives rather than preferred solutions." SMC 25.05.060C.1.c (emphasis added).

26. "A proposal exists ... when an agency has a goal and is actively preparing to make a decision on *one or more* alternative means of accomplishing that goal, and the environmental effects *can be meaningfully evaluated*. *A proposal may therefore be a particular or preferred course of action or several alternatives.* ... The term 'proposal' may therefore include 'other reasonable courses of action' *if there is no preferred alternative and if it is appropriate to do so in a particular context.*" SMC 25.05.784 (emphasis added).

27. "Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed....) Proposals ... are closely related ... if they a. Cannot or will not proceed unless the other proposals ... are implemented simultaneously with them; or b. Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation." In determining whether proposals are similar, factors such as "common timing, types of impacts, alternatives, or geography" are to be considered. SMC 25.05.060 C.3 and C.3.a.

28. Lead agencies are to "determine the appropriate scope and level of detail of environmental review to coincide with meaningful points in their planning and decision-making processes." "Environmental review may be phased," and "phased review assists

agencies and the public to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready." SMC 25.05.060 E.1 and E.2. Phased review is appropriate when "the sequence is from a non-project document to a document of narrower scope," or from "an environmental document on a specific proposal at an early stage ... to a subsequent environmental document at a later stage." SMC 25.05.060 E.3. "When a lead agency knows it is using phased review, it shall so state in its environmental document." SMC 25.05.060 E.5.

29. An EIS is required for proposals "significantly affecting the quality of the environment." SMC 25.05.330. The lead agency determines whether an EIS is required during the threshold determination process. *Id.*

30. In reaching a threshold determination, the agency is to determine "if the proposal is likely to have a probable significant adverse environmental impact based on the proposed action, the information in the checklist, and any additional information furnished by the" applicant. The agency is also to "[c]onsider mitigation measures which an agency or the applicant will implement as part of the proposal, including any mitigation measures required by the City's development regulations or existing environmental rules or laws." SMC 25.05.330 A.2 and A.3 (emphasis added).

31. An agency is to make the threshold determination "based upon information reasonably sufficient to evaluate the environmental impact of the proposal." SMC 25.05.335. "A threshold determination shall not balance whether the beneficial aspects of the proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts" SMC 25.05.330E.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 25.05.680. The Department's DNS is to be accorded substantial weight, and the party appealing the decision bears the burden of proving that it is "clearly erroneous". SMC 25.05.680 B.3. A decision is clearly erroneous if the Examiner is "left with a definite and firm conviction that a mistake has been committed." *Moss Bellingham*, 109 Wn. App 6, 13, 31 P.3d 703 (2001)(citations omitted).

2. The Appellants claim that in response to scoping comments from the public on the EIS for the SWFMP, the Department "shifted the scope of the proposal," i.e., dropped the rebuild of the NRDS and SRDS from the proposal, to avoid preparation of an EIS on those projects. This scoping change was made in the FSEIS on the SWFMP issued in August of 2005. It cannot be appealed in the context of appealing the SEPA threshold determination for this project action in 2008.

3. The Appellants did not appeal the FSEIS on the SWFMP and now claim that previous SEPA documents indicated that SEPA review of the NRDS rebuild would include an EIS that also analyzed off-site alternatives. The record does not support this claim. The FEIS prepared for the 1998 SWMP confirmed that the City was using phased environmental

review, and stated that modifications to *existing* facilities "could be subject to project-specific environmental review depending on the nature of the modifications," but that environmental review of *new* facilities would also consider the issue of siting. FEIS at 1-31. The FSEIS on the SWFMP stated that the basic programmatic decisions on upgrading the NRDS were made during the City's 1998 comprehensive solid waste planning process and that the next stage of SEPA documentation for that upgrade "would be project-specific and would be prepared close to the time when land use and/or building permits are sought." Moreover, Appendix L to the FSEIS expressly rejected alternative sites for the NRDS. Although project-specific SEPA review could include preparation of an EIS, nothing in the environmental documents prepared for the City's SWMP or SWFMP gives any indication that an EIS would be prepared for the NRDS rebuild, or that the City would give further consideration to alternative locations for the NRDS.

4. Again, because the Department's decision to remove the NRDS from the FSEIS on the SWFMP was issued in August of 2005, the Appellant's claim that the Department violated SEPA's prohibition against "piecemealing" is time-barred. Even if it were not, the record demonstrates that the Department's justification for removing the NRDS from consideration in the FSEIS on the SWFMP is consistent with SMC 25.05.060C.2 and C.3.

5. Because the Department's decision to delay review of the environmental impacts of the NRDS rebuild was made in conjunction with the 2005 FSEIS on the SWFMP, the Appellant's claim that the Department violated SEPA's phasing requirements is also time-barred. The FEIS on the SWMP stated that the City was using phased environmental review, and that modifications to existing facilities "could be subject to project-specific environmental review depending on the nature of the modifications." FEIS at 1-31. The FSEIS on the SWFMP stated that the basic programmatic decisions on upgrading the NRDS were made during the City's 1998 comprehensive solid waste planning process and that the next stage of SEPA documentation for that upgrade would be project-specific and prepared close to the time when permits were sought for the upgrade. An appeal of the City's decision to use phased review was required at the time the FSEIS was issued in 2005. Even if the appeal were not time-barred, the record demonstrates that the Department's use of phased review is consistent with SMC 25.05.060.

6. The Appellants claim that an analysis of alternatives to rebuilding the NRDS at its present location was required under SEPA. However, the Department has made a decision to rebuild the NRDS in its present location, and has defined the proposal as a "particular course of action," as allowed under SMC 25.05.060 and .784. There is no error here.

7. The record does not support the Appellants' allegation that the proposal lacks sufficient detail to assess its environmental impacts. The preservation deposition of Mr. Campbell, who performed the visual impact analysis, demonstrates that he used a widely recognized methodology for his study and had sufficient information on the project's parameters, essentially using a "worst case" scenario to determine likely impacts on both public and private views. The transportation engineer who prepared the Transportation

Technical Report testified that she had sufficient information from the trip generation and waste generation projection models prepared for the proposal to analyze its likely impacts on traffic, parking, and pedestrian safety. The consultant who prepared the Air Quality Technical Report also had sufficient traffic information from which to assess traffic-related air quality impacts. With respect to other impacts on air quality, the analysis was based on sufficient parameters for the NRDS design and the consultant's knowledge of the City's waste stream policies and the pollutants generated by both construction activities and solid waste utilities. As required by SMC 25.05.055 B and SMC 25.05.784, the DNS was prepared at the earliest possible point in the decision making process when its principal features and environmental impacts could be reasonably identified and meaningfully evaluated.

8. Most of the Appellants' claim, that the Director's DNS failed to evaluate the proposal from the baseline of an empty lot, was addressed in the Examiner's August 11, 2008 order denying the Appellants' motion for judgment on the merits. There is no evidence in the record of an established closure date for the NRDS, nor does the evidence presented establish that it will cease to exist in the short-term, as Appellants claim. The Appellants point to the fact that most recent development in the area is commercial and residential, with few industrial uses remaining. They assert that after 40 years, the NRDS no longer fits with the neighborhood and that it is time for it to be relocated. As argued by the Director, this is a policy issue outside purview of an administrative appeal. The Comprehensive Plan and zoning for the area remain industrial, and industrial uses are therefore permitted. The evidence indicates that the NRDS will continue to operate at its present location for the foreseeable future.

9. The Appellants presented no legal authority for the proposition that existing conditions constitute an incorrect baseline for analyzing a proposal's environmental impacts. Neither the SEPA statute nor the SEPA rules identify a baseline for environmental analysis. However, environmental impact analysis in relation to existing conditions is the norm. See, e.g., *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 435, 105 P.3d 94 (2005); *Floating Homes Assoc. v. Washington Dept. of Fish and Wildlife*, 115 Wn. App. 780, 785, 64 P.3d 29 (2003); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 59, 52 P.3d 522 (2002); *Richland Homeowners Preservation Ass'n v. Young*, 18 Wn. App. 405, 411, 568 P.2d 818 (1977). This was confirmed by the transportation engineer who prepared the Transportation Technical Report for the proposal at issue. The use of existing conditions as a baseline for measuring impacts likely stems from the numerous questions in the SEPA checklist seeking a description of existing environmental conditions, see SMC 25.05.960B, and from the need to avoid the speculation and uncertainty that would otherwise ensue as agencies and applicants grappled in each case for an appropriate baseline for impact analysis. There is no clear error here.

10. The Appellants assert that however defined, the proposal will have significant adverse impacts that have not been adequately mitigated. In determining that the proposal would not have significant adverse environmental impacts, the Director properly considered the mitigation measures the Department would implement as part of the

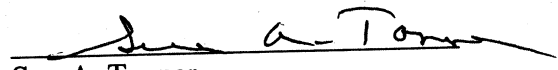
proposal, including measures required by City Code. SMC 25.05.330 A.2 and A.3; *see* Exhibit 17 at 3-4 and 5-6. The evidence in the record supports the Director's determination. The testimony did establish that there are *existing* adverse air and traffic impacts associated with the NRDS. However, the issue on appeal is additional impacts from the proposal. The Visual Technical Report established that there will be some view impacts associated with the proposed rebuild, but these were not shown to be significant, and the views are not protected under the City's SEPA policies. With respect to other impacts, including air quality, odors, traffic and noise, the evidence shows that the impacts from the proposal will be lower than those from the existing facility.

11. The Appellants did not meet their burden of demonstrating that the Director's DNS was clearly erroneous, and it should be affirmed.

Decision

The Director's Determination of Nonsignificance is **AFFIRMED**.

Entered this 20th day of October, 2008.


Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. A request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued, as provided by RCW 36.70C.040.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, PO Box 94729, Seattle, Washington 98124-4729, (206) 684-0521.

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